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Supreme Court of the United States

OCTOBER TERM, 1962

No. 563

HONORABLE STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, *Petitioner*,

v.

OCCIDENTAL PETROLEUM CORPORATION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on April 20, 1962.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 303 F. 2d 55. The order of Judge Chandler, reviewed by the Court of Appeals, is printed in Appendix B at p. 21a.

JURISDICTION

The Court of Appeals judgment was entered April 20, 1962, and a rehearing denied on June 1, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. When reviewing a petition for mandamus to compel a federal district judge to disqualify himself, following the latter's rejection of an affidavit of bias filed pursuant to 28 U.S.C. § 144, does a U.S. Court of Appeals have jurisdiction to receive evidence and make fact findings independently of the record below?

2. May a U. S. Court of Appeals obtain jurisdiction to act on a petition for a mandamus compelling a Federal district judge's disqualification, by issuing a show-cause order at a time when the District Judge in question has not yet ruled on an affidavit of bias filed pursuant to 28 U.S.C. § 144?

3. When reviewing a petition for mandamus to compel a federal district judge to disqualify himself, following the latter's rejection of an affidavit of bias filed pursuant to 28 U.S.C. § 144, is the sole question before the Court of Appeals a question of law, namely, the legal sufficiency of the affidavit?

4. What is the proper standard by which to determine whether allegations of fact in a affidavit filed pursuant to 28 U.S.C. § 144 are legally sufficient to compel a District Judge to recuse himself? More particularly, may facts not of extrajudicial origin suffice to require his disqualification for personal bias within the sense of 28 U.S.C. § 144?

5. May a U. S. Court of Appeals employ its Circuit Judicial Council as a fact-finding or advisory body in connection with the court's review of a Federal district judge's rejection of an affidavit of bias filed pursuant to 28 U.S.C. § 144? Further, if it may do so, is it proper for the Court not to allude to this usage in its opinion deciding the matter in question?

6. May a U. S. Court of Appeals issue a mandamus ordering a Federal district judge to disqualify himself from an entire case, following the latter's rejection of an affidavit of bias filed under 28 U.S.C. § 144, when the only remedy prayed for in the affidavit was that the judge assign two pending motions to another judge for hearing and adjudication?

7. Was the mandamus ordering petitioner's disqualification in the circumstances of the present case a sound exercise of discretion by the Court of Appeals for the 10th Circuit?

STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C. § 144; 28 U.S.C. § 332; 28 U.S.C. § 1651; 28 U.S.C. §§ 1291 and 1292.

STATEMENT OF THE CASE

During the course of a reorganization in bankruptcy proceeding in the United States District Court for the Western District of Oklahoma, in which Judge Stephen Chandler was sitting, Occidental Petroleum Corporation, one of the creditors, filed an affidavit of personal bias pursuant to 28 U.S.C. § 144, along with an application for Judge Chandler's disqualification (App. A, p. 1a *et seq.*). It did so on March 2, 1962.

The affidavit stated affiant's belief that Judge Chandler was personally biased against Occidental. In support of this assertion, it recounted some of the history of the rather protracted litigation and enumerated several remarks made by the Judge therein. In its affidavit Occidental prayed that Judge Chandler disqualify himself from hearing two motions then set down for hearing on March 13, 1962. One motion, by the trustee in bankruptcy, was to subordinate Occidental's stock in the debtor corporation. The other was to tax certain costs against Occidental for having failed to fulfill its responsibilities under an earlier reorganization agreement.

On March 6, 1962, Occidental filed an original petition in the Court of Appeals for the 10th Circuit, seeking a writ of mandamus and/or prohibition, restraining Judge Chandler from conducting the hearing scheduled for March 13 or from deciding any other matters arising from the bankruptcy proceedings which "may affect Petitioner in any manner other than merely as a member of the class of preferred stockholders of Parker. . . ." (R. p. 2-i). In the petition—to which a copy of the March 2 affidavit was appended—Occidental recited the pendency of the trustee's motions, its belief as to Judge Chandler's personal bias and several other items. Upon receiving the petition, the Court of Appeals immediately filed an order, staying the district court proceedings and requiring Judge Chandler to show cause at a March 12 hearing why the writ should not issue (R. p. 3).

On March 9, 1962, Judge Chandler issued an order in which he adjudged the affidavit of bias to be "legally insufficient." (App. B, p. 22a) He also noted, nonetheless, his willingness to assign to another judge any

questions involving Occidental, saying "The Court further states that prior to the filing of the motion to disqualify . . . counsel for applicants were advised . . . by the attorney for the Trustee . . . that if they preferred that such matters be tried by another judge . . . that such matters would be assigned to another judge. . . . "

Later, at the March 12 hearing before the Court of Appeals, Occidental presented to that court a petition for leave to amend and supplement its petition of March 6, "and to . . . enlarge the prayer for relief set forth therein. . . . " (R. p. 5) In this petition, which was received by the Court of Appeals (R. 6), Occidental prayed that Judge Chandler be restrained from hearing or deciding "all matters arising in these proceedings . . . whatsoever. . . . " (R. p. 5q) Occidental had not made such a request of the district court, nor had it served a copy of the petition on Judge Chandler before filing it with the Court of Appeals.

The Court of Appeals for the 10th Circuit, through a three-judge panel, presided over hearings on the disqualification question on March 12 and 13 and April 10, 1962. At these hearings the Court received evidence, in the form of testimony and exhibits, and heard arguments by all interested parties (See generally R. 7-a and 12, where the reporter's transcript of the March and April proceedings are incorporated by reference). In an order of March 14, restraining Judge Chandler from proceeding further in the bankruptcy proceeding, the Court stated, *inter alia*, that the disqualification matter was being heard "on the petition and amended petition of Occidental Petroleum Corporation. . . . " (R. p. 9)

At the close of the April 10 session the Court of Appeals resolved to refer the disqualification question

to the 10th Circuit Judicial Council, deeming it to be a matter of unusual seriousness (App. C, p. 27a).

On April 20, 1962, the Judicial Council convened at 11 a.m. in Denver, Colorado, considered "all matters presented to the Court" in connection with the mandamus proceeding and issued an "order" the same day (App. C). The "order" made express findings that Judge Chandler had conducted hearings in chambers without inviting all interested litigants, had tried to prevent a court officer from performing his official duties, possessed a personal bias against Occidental and concluded that the "proper administration of justice requires that all further proceedings in connection with the Parker bankruptcy be heard . . . by another Judge."

Later, on the same day, the Court of Appeals filed a *per curiam* opinion ordering Judge Chandler's total disqualification from the bankruptcy proceeding. In its opinion the Court made express findings of fact "[F]rom the record made before us . . . ." These findings duplicated *verbatim* those listed in the Judicial Council "Order," but did not refer to it. (App. C, pp. 25a and 28a).

REASONS FOR GRANTING THE WRIT

1. In receiving evidence and making factual determinations independently of the record below, the Court of Appeals for the 10th Circuit departed so egregiously from what is felt to be the statutory limit of jurisdiction for federal appellate tribunals, as to invite review on the strength of the Court's supervisory duties toward inferior federal courts.

2. There is a serious question as to whether the Court of Appeals had jurisdiction to issue the mandamus since the show-cause order, by which it undertook to

assert jurisdiction, was issued before Judge Chandler had ruled on the affidavit of bias and application for disqualification filed in the district court.

3. The 10th Circuit's use of its Judicial Council as fact finder and advisor or a quasi-judicial arm was an unprecedented and extra-legal course of action. The statute creating such councils, 28 U.S.C. § 332, contemplates only an administrative or business function for the counsels. Furthermore, the error of this novel tactic is compounded by the fact that the court of appeals failed to mention in its opinion its reliance upon the Judicial Council, although the purported findings of fact in the opinion reflected *verbatim* those in the Judicial Council "order."

4. There is a pronounced conflict between the 10th, 1st and 6th Circuits as to whether a Court of Appeals, when reviewing a district judge's refusal to disqualify under a 28 U.S.C. § 144 affidavit, is confronted solely with a question of law or may review facts as well. In *Green* v. *Murphy*, 259 F.2d 591, 593 (1st Cir. 1958), a case procedurally identical to the present one, the Court in dismissing the petition, stated that "[t]here can be no dispute either in the district court or on appeal as to the truth or falsity of the allegations of the affidavit. It held that "the legal sufficiency of what is alleged in the affidavit . . . and the inferences . . . which may be drawn properly therefrom constitute the very basis on which the issue of disqualification . . . must be decided ultimately."

In *Albert* v. *United States Dist. Court for the Western Dist. of Michigan*, 283 F. 2d 61, 62 (6th Cir., 1960), the court observed flatly "[m]andamus does not lie to compel a judge of an inferior court to reverse a decision made by him in the exercise of a legitimate jurisdiction . . . or to compel him to decide

according to the dictates of any judgment but his own . . . ."

There is a similar conflict in practice between the 10th and other circuits. See, *e.g.*, *Williams* v. *Kent*, 216 F.2d 342 (6th Cir. 1954); *Tucker* v. *Kerner*, 186 F.2d 79 (7th Cir. 1950); *Hurd* v. *Letts*, 152 F.2d 121 (D.C. Cir. 1945); *In re Lisman*, 89 F.2d 898 (2d Cir. 1937).[1]

5. There is a further conflict between the 10th and 7th Circuits as to the *propriety*[2] of issuing a mandamus compelling a district judge's disqualification following the latter's rejection of an affidavit of bias--quite apart from the question as to the appellate court's scope of inquiry. See *Korer* v. *Hoffman*, 212 F.2d 211 (7th Cir. 1954).

6. Despite the advanced age of 28 U.S.C. § 144, and the fairly recurrent litigation it has spawned, its substantive content is still marked by several uncertainties. Because this provision treats of perhaps the most delicate step in the entire federal judicial process —from the standpoint of inspiring confidence in ltigants—the instant petition raises legal questions of inherent significance.

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[1] *Cf. also Skirvin* v. *Mesta*, 141 F. 2d 668 (10th Cir. 1944).

[2] On the matter of whether an appellate court has the naked *power* or jurisdiction to issue the writ in such cases as the present one, petitioner's analysis of *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), leaves him uncertain as to its applicability. If *LaBuy* does not control the present case, petitioner wishes to urge, in addition to the questions raised in the text, the serious question as to whether the 10th Circuit had jurisdiction under the all-writs act to require Judge Chandler's disqualification by mandamus. Furthermore, if this Court should consider the time right for reconsideration of the rather broad construction that has been put on the all-writs act, the instant case affords a suitable vehicle for such reconsideration.

ARGUMENT

The proceedings of the 10th Circuit below abound with error, some so glaring as to invite consideration by this Court. To grant the writ of certiorari in this case would be altogether consistent with this Court's traditional practice of reserving it for review of important questions of law.

Logically, the first problem raised by the 10th Circuit's issuance of the mandamus is the very grave question as to whether it had the requisite jurisdiction to do so. As the record clearly discloses, Occidental filed its original petition for mandamus on March 6, 1962. The Court of Appeals, by issuing a show-cause order on the same day, asserted jurisdiction over the petition—at least putatively. Judge Chandler's ruling on Occidental's affidavit, however, did not follow until March 9. Since Occidental's affidavit and application for disqualification were *sub judice* when the petition in the appellate court was filed—and since it was essentially Judge Chandler's decision on these matters that petitioners wanted the 10th Circuit to review—it would seem that the assertion of jurisdiction was premature. The fact that the Judge ruled on the affidavit, finding it legally insufficient, was in time considered by the Court of Appeals. If, however, on the date of the show-cause order that court lacked jurisdiction to consider the petition for mandamus, it follows that it did not acquire such jurisdiction merely because it *later* considered the judge's decision. It is important to note also that, once proceedings had been initiated in the Court of Appeals, there was no subsequent motion or pleading by petitioner that could be said to cure the original defect of no jurisdiction.

Even assuming that the Court had jurisdiction to hear and decide the petition for mandamus, there is

the second, and still more troublesome question of whether it had jurisdiction to receive evidence and compile its own record as a basis for deciding the matter—in effect, to conduct a trial *de novo.*

Under the all-writs statute federal courts of appeal are restricted in issuance of extraordinary writs of mandamus to those instances in which such writs operate "in aid of their jurisdiction." This jurisdiction is exclusively statutory in origin, and appellate in character. *Kentucky* v. *Powers*, 201 U.S. 1, 24 (1905); *Whitney* v. *Dick*, 202 U.S. 132, 137 (1905); *Ex parte Bollman,* 4 Cranch 75, 93 (1807, Marshall, C.J.). The jurisdictional grants are found in 28 U.S.C. §§ 1291 and 1292. By definition and by unbroken tradition this appellate jurisdiction does not include the authority to take testimony or other evidence and to make factual evaluations entirely apart from the record in the court of original jurisdiction.

What the 10th Circuit actually did in the present case was to conduct a trial *de novo* on the issue of the trial judge's disqualification. Any reluctance to accept this characterization of the proceedings below is readily dissipated by even a casual examination of the record. The record discloses that the Court of Appeals issued orders that the matter be tried to the court. (R. p. 6). The proceedings before the court (sitting as a Court rather than as Judicial Council) consumed some 400 pages in the reporter's transcripts. (R. 7-a and 12). The record is replete with offers of evidence and formal receipt thereof, cross-examination, exhibits, objections to evidence and rulings by the court, and the like.

This *de novo* trial—if nothing else perpetrated by the Court— was unmistakable error of the most graphic character.

It could be argued to this Court that the instant decision of the Court of Appeals for the 10th Circuit is a temporary deviation from the practice evidently well established elsewhere. Such a conceivability, however, is less than realistic. The "deviation" represented in the present decision is already institutionalized in the 10th Circuit. See *United States* v. *Ritter*, 273 F.2d 30 (10th Cir. 1959). There is, moreover, no hope of change in sight.

The instant decision is also logically incompatible with the thesis of *Berger* v. *U.S.*, 225 U.S. 22 (1920). There, this Court clearly held that a district judge, when faced with an affidavit of bias filed under 28 U.S.C. § 144, may rule on its legal sufficiency but may not dispute the facts alleged in it. If the only question before the trial judge is one of law rather than fact, this obviously suggests that the same would be true on an appeal from the judge's decision. Accordingly, in reviewing a trial judge's rejection of such affidavits, appellate courts have considered themselves confined to reviewing the question of the affidavit's legal sufficiency. See generally the cases cited *supra* at pages 7 and 8 and especially *Green* v. *Murphy*.

The mandamus writ is, of course, a discretionary one. *Ex parte Peru*, 318 U.S. 578 (1943). The most venerable proposition in Federal law, relative to use of the mandamus to control actions of lower courts, is that the writ should lie only in exceptional cases, typically where the lower court has acted without jurisdiction or has clearly usurped judicial power. *Bankers Life Co.* v. *Holland*, 346 U.S. 379 (1953); *In re Parsons*, 150 U.S. 150 (1893); *Ex parte Hoyt*, 13 Pet. 279 (1839, Story, J.).

It is striking, therefore, that the Court of Appeals for the 10th Circuit is the only one to have issued two mandamuses compelling a district judge's disqualification, following the latter's rejection of an affidavit of bias. Furthermore, it appears to be the *only* court ever to have done so where the facts alleged in the affidavit of bias occurred *during* the very judicial proceeding from which a litigant sought to remove the trial judge.

It is all the more striking because the very factors which have influenced other federal appellate courts to deny the writ in cases like the present one are also present here. Probably the most significant of these reasons are: (1) the fact that an alternative remedy by appeal is available to petitioner and (2) the fact that the allegations in the affidavit below related no extrajudicial occurrences whatever, but merely occurrences during the judicial proceeding in question.

It is well established, of course, that Judge Chandler's rejection of the affidavit of bias could be assigned as error on appeal. See *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 45 (1913); *Korer* v. *Hoffman*, 212 F. 2d 211 (7th Cir. 1954); *Minnesota & Ontario Paper Co.* v. *Molynaux*, 70 F. 2d 545, 546 (8th Cir. 1934). The fact that an alternative remedy by appeal is available presents a strong reason for refusing such a writ as was requested below. *Albert* v. *U. S. Dist. Court for Western Dist. of Mich.*, 283 F. 2d 61 (6th Cir. 1960).

Another point overlooked by the Court of Appeals, in its haste to grant the petition for mandamus, was that a district judge, sitting in a reorganization proceeding, occupies both a judicial and, so to speak, an administrative capacity. Allegations of *ex parte* conferences, viewed as a part of a judge's administrative

efforts to run a bankrupt corporation under reorganization, do not logically suggest personal bias, as they might if made in the course of a more typical judicial proceeding. This point was well made before the Court of Appeals below by the Securities & Exchange Commission, which filed an amicus brief in behalf of Judge Chandler.

The case for granting the writ sought below is weakened further by the fact that the affidavit's allegations nowhere speak of facts or transactions arising before the instant judicial proceeding, which might reasonably suggest a pre-existing and personal bias on the part of Judge Chandler. At least one court of appeals appears to regard extrajudicial allegations as a *sine qua non* for disqualification in cases such as the present one. See *Craven* v. *U. S.*, 27 F. 2d 605 (1st Cir. 1927). At all events, the absence of any such extrajudicial allegations in the Occidental affidavit certainly reinforces Judge Chandler's conclusion that it was not legally sufficient to require his disqualification. This point was, of course, not touched upon by the 10th Circuit's opinion, nor did the latter address itself to the general and important question of what standards should properly determine the legal sufficiency or insufficiency of such affidavits. These *lacunae* in that court's opinion, along with the more profound issues of jurisdiction and trial *de novo*, offer compelling reasons for granting certiorari on the instant petition.

In sum, the procedure of the Court of Appeals below, both in creating its own record and in use of the Judicial Council as a fact finding and quasi-judicial advisory arm, was a cardinal aberration from lawful judicial administration. The very fact that the court's decision was inextricably linked with its own

fact findings was enough to vitiate it. The reason is simple. The opinion did not even purport to pass upon the sole question before it, *i.e.*, the legal sufficiency of the original affidavit, with its allegations assumed to be true. The court's enumeration of its fact findings, coupled with its order of disqualification based thereon, constitutes an exercise of jurisdiction the court does not possess. Beyond this, there is a grave question of propriety as to issuance of the writ at all, particularly since the attitude prevailing in the 10th Circuit clashes sharply with the more temperate approach of the other circuits.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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